Nos. 88-1070, 88-1075, 88-1385

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *et al.*,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., *et al.*,

v. *Petitioners,*

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

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QUESTIONS PRESENTED

The *certiorari* petitions in these cases challenge 7 aspects of OSHA's Hazard Communication Standard and the Third Circuit's decisions reviewing that Standard:

(a) the Third Circuit's factual determination that petitioners received adequate notice that the Hazard Communication Standard might be applied to their industry;

(b) the Third Circuit's statement that petitioners should be foreclosed from raising issues settled in prior litigation in which petitioners could have intervened, where the Third Circuit nevertheless proceeded to consider and reject petitioners' contentions on the merits;

(c) OSHA's factual determinations accepted by the Third Circuit regarding the existence of a "significant risk" in the affected industries;

(d) OSHA's factual determinations accepted by the Third Circuit that compliance with the Standard is feasible for the affected industries;

(e) petitioners' contention that the Standard—whose provisions plainly have a health-protective purpose and are not merely redundant of existing protective requirements—is not "reasonably necessary or appropriate";

(f) the Third Circuit's rulings in two earlier related proceedings that OSHA's original Standard arbitrarily and capriciously failed to cover employees subject to the significant risks the Standard is intended to correct, which petitioners contend constituted improper interference with OSHA's setting of rulemaking priorities;

(g) OSHA's determination, after full rulemaking, that the findings of a private scientific body provide an appropriate base for listing a chemical as a hazardous substance for purposes of the Standard.

The question presented is whether any of these determinations are worthy of this Court's review.

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BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1070 ("AGC Pet."), 88-1075 ("ABC Pet.") and 88-1385 ("NGFA/UT Pet."), insofar as those petitions seek review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988) ("*ABC v. Brock*").[1]

STATEMENT

1. The Provisions of the Hazard Communication Standard.

To enable employees to protect themselves from threats to their health, the regulation at issue here—the Hazard Communication Standard ("HCS" or "the Standard") promulgated by the Occupational Safety and Health Administration ("OSHA" or "the Agency")—requires employers to provide employees with basic information concerning hazardous substances found in the workplace, through a combination of methods including labeling, material safety data sheets ("MSDSs") and training.

The lion's share of the responsibilities created by the HCS falls on chemical manufacturers, importers and (to a lesser extent) distributors. The manufacturers and importers have the obligation under the Standard to "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200(d)(1). In addition, manufacturers and importers must treat as "hazardous" chemicals appearing on either of two lists: (1) the list of substances for which OSHA has established exposure limits in the standard

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[1] The petition for certiorari in No. 88-1075 also seeks review of the decision in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) ("*USWA III*"). The position of USWA and BCTD with respect to that decision is set out in their brief in opposition filed this date in *Elizabeth Dole, et al. v. United Steelworkers of America, et al.*, No. 88-1434.

for Air Contaminants that appears at 29 C.F.R. Part 1910, Subpart Z; and (2) the latest edition of *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, which is published and updated annually by the American Conference of Governmental Industrial Hygienists ("ACGIH").[2] 29 C.F.R. § 1910.1200(d)(3). The manufacturers and importers must "obtain or develop a material safety data sheet for each [such] hazardous chemical," § 1910.1200(g)(1), and must "ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment" of a hazardous substance "and with the first shipment after a material safety data sheet is updated," § 1910.1200(g)(6). Chemical manufacturers, importers, and distributors must also "ensure that each container of hazardous chemicals leaving the workplace is labeled" with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

Other employers, including the construction industry petitioners in Nos. 88-1070 and 88-1075, have much less extensive obligations under the HCS; these employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. These employers must: (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8);[3] (2) see to it that containers of hazardous chem-

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[2] ACGIH is a professional society whose membership consists of occupational health professionals who work for governmental agencies and educational institutions. Chemicals appearing on the Threshold Limit Values list are those that ACGIH has determined pose a health risk to employees who are exposed to them above a certain concentration.

[3] Where employees must travel between workplaces during a shift, "the material safety data sheets may be kept at a central location at the primary workplace facility." § 1910.1200(g)(9). At multi-employer workplaces, if the circumstances are such that the employees of one employer may be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter

icals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200 (f)(5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop, implement, and maintain a written hazard communication program that describes how the employer will meet the HCS's requirements as described above, § 1910.1200(e)(1).

2. History of the Regulation.

The rulemaking that culminated in the HCS was initiated by a Notice of Proposed Rulemaking published on March 19, 1982. *See* 47 Fed. Reg. 12092 *et seq.* (1982). In that notice OSHA proposed to limit the scope of the Standard to (i) chemical manufacturers and (ii) employers in the manufacturing sector as defined by Standard Industrial Classification (SIC) Codes 20 through 39. *Id.* at 12092, 12101, 12119. In support of the latter limitation, the Agency stated that "[i]t appears that employees in manufacturing facilities are at the greatest risk of harmful exposure to chemicals." *Id.* at 12101.

However, OSHA's notice made it clear that the question of the scope of the Standard had not been finally resolved, but was a matter to be determined in the rulemaking. Stating that "*[t]he scope of the [proposed] standard could have been* limited only to chemical manufacturers (SIC 28), or could have been *broadened to include all employers in all workplaces*," *id.* at 12101 (emphasis added), OSHA concluded its discussion of this aspect of the proposal with the following words: "*Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.*" *Id.* at 12102 (emphasis added).

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must either provide copies of the MSDSs for such chemicals to the other employer, "or . . . make [them] available at a central location in the workplace." § 1910.1200(e)(2)(i).

In opening the rulemaking hearings, OSHA's Director of Health Standards Programs reiterated that the scope of the Standard was "certainly an open issue," and one on which the Agency "welcome[d] additional comment." [4] He added:

> . . . [T]he objective in a hearing like this is to try to get suggestions from interested parties as to what the agency should do and *the preliminary proposal to narrow the scope of the standard* to just those . . . [SIC] codes *is just that, it's a preliminary proposal.*
>
> * * * *
>
> The agency's mind is not made up on that and we're ready to listen to anything and to accept any kind of evidence, orally or in writing, which you might have.
>
> * * * *
>
> The scope of the standard will be determined by the evidence presented. *The evidence will dictate what we do. Now if the evidence supports going beyond SIC Codes 20 through 39, we'll go beyond SIC Codes 20 through 39.*
>
> * * * *
>
> For that reason, we're having hearings across the country and obtaining new current information.[5]

In response to OSHA's notice, extensive evidence was submitted in the rulemaking proceedings supporting the application of the Standard to non-manufacturing industries,[6] including specifically the construction industry.[7]

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[4] *Informal Public Hearings on Hazard Communication before the Occupational Safety and Health Administration* (1982), transcript p. 14 (testimony of R. Leonard Vance).

[5] *Id.* at 27-30 (emphasis added).

[6] *See e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 411-13, 417-18, 606-07, 1354-55, 1360, 1470, 2123-24, 2193-97, 2254-61, 2653-54, 2808-09, 2936-37, 3036, 3077-79, 3597-98, 3814-27, and the following exhibits introduced therein: 19-109; 19-161; 36; 49; 52C; 62; 111; and 122.

[7] *See, e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 2123-24 (Rodney Wolford of the International Brother-

At the conclusion of the rulemaking, OSHA promulgated a final standard in November 1983. *See* 48 Fed. Reg. 53280 *et seq.* (1983). The scope of that Standard was broader than had been proposed in the March 1982 notice in one respect: where the proposal had required only chemical *manufacturers* to perform hazard evaluations and to prepare MSDSs and labels, the Standard as promulgated required chemical *importers* (and, in some instances, chemical *distributors* as well) to do the same. § 1910.1200(d)(1), (f)(1), (g)(1); 48 Fed. Reg. 53286-87, 53342-43. However, as in the March 1982 proposal, all other provisions of the final Standard were limited to employers in the manufacturing sector, *i.e.* SIC Codes 20 through 39.

In the preamble to the Standard, OSHA discussed its decision on the scope issue at length, characterizing that issue as one of the key "technical and policy issues raised by the proposed standard." *Id.* at 53284. Acknowledging that much evidence had been offered to support the proposition that the scope of the Standard should be expanded to include non-manufacturing industries, *id.* at 53286, OSHA explained its decision as follows:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need. [*Id.*]

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hood of Painters and Allied Trades (IBPAT)) (paint applicators in construction need HCS at least as much as those in manufacturing); Exh. 19-161 at 6 (IBPAT) ("the [health] problems and solutions for the paint and allied trades industry extend from the manufacturer through the applicator without regard for artificial distinctions such as SIC Codes"); Exh. 36 at 12-13 (AFL-CIO) (need for HCS "is as great in construction as in manufacturing"); Exh. 49 at 6-7 (UAW).

USWA and others filed petitions for review of the 1983 Standard. USWA contended, *inter alia*, that OSHA's decision to limit the Standard to the manufacturing sector was not supported by the rulemaking record, while petitioner Public Citizen attacked OSHA's determination not to adopt the *Registry of Toxic Effects of Chemical Substances* ("RTECS") published by the National Institute for Occupational Safety and Health ("NIOSH") as the base list of chemicals deemed to be hazardous.[8]

On review, the Third Circuit held that OSHA's rationale for confining the Standard to manufacturing "does not withstand . . . scrutiny." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 739 (3d Cir. 1985) (*"USWA I"*), AGC Pet. App. at 41a.[9] That court noted that OSHA's reasoning failed even to "address the . . . contention" that because the hazards dealt with by the Standard cut across all SIC Codes, it is irrational to limit the HCS to particular SIC Codes. AGC Pet. App. at 39a. And the Third Circuit recognized that OSHA's sole rationale for limiting the Standard to the manufacturing sector—namely, the contention that employees in that sector, taken as a whole, experience a higher rate of illness from exposure to hazardous chemicals than employees in other sectors—was doubly flawed. First, OSHA's contention was, at best, a gross overgeneralization, *see* AGC Pet. App. at 37a-38a; and second, even to the extent that the generalization might be sound, it would only provide a reason "why the . . . [HCS should apply to] employees in the manufacturing sector, [and would not explain] why the same information is not needed for workers in other sectors. . . ." AGC Pet. App. at 41a.

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[8] The RTECS list contains far more substances than the two lists adopted by OSHA. *See* 48 Fed. Reg. 53298 (1983).

[9] References to "AGC Pet. App." are to the Appendix to the Petition for Certiorari in No. 88-1070.

Relying on § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), which expressly mandates OSHA to promulgate standards that are designed to assure that "*no* employee will suffer material impairment of health,"[10] the Third Circuit directed the Secretary "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." AGC Pet. App. at 42a. As that court subsequently explained, "[t]hat holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees." *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1267 (3d Cir. 1987) (*"USWA II"*), AGC Pet. App. at 63a.[11]

Instead of proceeding promptly to the reconsideration that had been ordered by the Third Circuit, OSHA delayed, and did nothing except to publish an Advance Notice of Proposed Rulemaking ("ANPR") soliciting public comment on various matters relating to industries not covered by the HCS. *See* 50 Fed. Reg. 48794 *et seq.* (1985). At that juncture USWA returned to the Third Circuit, filing a motion to enforce the order that court

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[10] Section 6(b)(5) provides in pertinent part that "[t]he Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . ., shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *See infra* at 20.

[11] The Third Circuit also rejected Public Citizen's challenge to OSHA's decision not to incorporate the RTECS list, holding that OSHA acted properly on the basis of its finding that the RTECS list was both overinclusive and underinclusive for this purpose. AGC Pet. App. at 42a.

had entered in *USWA I*. In *USWA II* the Third Circuit granted USWA's motion in pertinent part, concluding that the "further inquiry" in which OSHA was engaged "was unnecessary." AGC Pet. App. at 65a. That court held that the rulemaking proceedings conducted prior to the promulgation of the 1983 HCS had given adequate notice to all employers that the standard might cover non-manufacturing industries, and that there was no reason to conduct further proceedings because the original rulemaking record provided a proper basis for determining the final scope of the Standard. AGC Pet. App. at 65a-68a.[12]

Having determined that OSHA was unreasonably delaying the extension of the HCS to other industries, the Court of Appeals issued the following order, AGC Pet. at 68a (footnote omitted):

> [W]e will direct that the Secretary shall, within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard commu-

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[12] In that connection that Third Court noted that the 1983 Standard covered importers and distributors, even though the 1982 Notice had not done so:

> Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed. Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption. [*USWA II*, AGC Pet. App. at 67a.]

> nication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers.

Subsequently, on August 24, 1987, OSHA promulgated the Standard at issue here, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). In addition to expanding the coverage, OSHA modified the HCS in certain respects to "tailor" the Standard to fit the characteristics of the newly included industries. *Id.* at 31858. These modifications include provisions regarding multi-employer and multi-site workplaces, *see supra* note 3, and broadened exemptions from the Standard's requirements for certain drugs and consumer products, *see* 29 C.F.R. § 1910.1200 (b) (6) (vii), (viii); 52 Fed. Reg. 31862.[13]

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[13] On September 10, 1987, OSHA submitted the revised HCS to the Office of Management and Budget for review under the Paperwork Reduction Act. On the basis of its review OMB "disapproved" three provisions of the Standard: (1) the requirement that employers at multi-employer worksites exchange their MSDSs, either individually or through a central location, § 1910.1200(e)(2); (2) the new consumer product exemption, § 1910.1200(b)(6)(vii), which OMB opined should be broadened even more; and (3) the new exemption for drugs, § 1910.1200(b)(6)(viii), which OMB likewise stated should be broadened. OMB announced that these "disapproved" provisions could not go into effect. See *USWA III*, ABC Pet. App. at 29a.

In *USWA III* the Third Circuit overturned OMB's action, and directed the Secretary to put the "disapproved" provisions into effect. This decision is challenged in the certiorari petitions in Nos. 88-1075 and 88-1434. As noted above, the position of USWA and BCTD with respect to this matter is set out in their brief in opposition in No. 88-1434.

Most recently, OSHA has sought additional comments from the public, to guide the Agency in considering further modifications of the Standard; the notice of proposed rulemaking is published at 53 Fed. Reg. 29822. The period for submitting comments has now closed, and final action by OSHA is pending.

3. The Decision Below.

In *ABC v. Brock*, the Third Circuit rejected industry petitions for review of the revised HCS. That court determined, *inter alia*, (i) that all employers had received fair notice in the 1982 rulemaking proceedings that the Standard might be applied to their industries, *see* AGC Pet. App. at 10a-11a; (ii) that the "significant risk" requirement of the OSH Act was satisfied by OSHA's "significant risk finding [which] applied to all workers who would be exposed to hazardous chemicals," *id.* at 12a; (iii) that OSHA's findings satisfied the "feasibility" requirement of § 6(b)(5) of the Act, *id.* at 13a-14a; and (iv) that in adopting the ACGIH Threshold Limit Values list as one of the base lists of hazardous substances for purposes of the HCS, OSHA did not unlawfully delegate its rulemaking authority to a private body, *id.* at 15a.

ARGUMENT

The *certiorari* petitions to which we respond are like supertankers filled with soapsuds: those petitions contain a great volume of froth without any substance. As we demonstrate point-by-point, the questions presented concern in the main fact-bound issues generated by applying correct—indeed undisputed—legal principles to the situation at hand, none of which warrants this Court's attention and all of which were correctly resolved below. Moreover, while petitioners claim otherwise, it is perfectly clear that the decisions below are *not* in conflict with the decisions of this Court or of any of the other courts of appeals. The petitions should be denied.

1. The Rulemaking Notice: Petitioners challenge, as "clearly erroneous," ABC Pet. at 13, the Third Circuit's determination that non-manufacturing employers received adequate notice that the Standard here might be applied to their industries, and were thus "alert[ed] . . . of the opportunity to submit comments as to the cover-

age of their industry," *ABC v. Brock*, AGC Pet. App. at 11a.

As petitioner AGC twice acknowledges, the adequacy of a rulemaking notice is a "factual issue." AGC Pet. at 14, 27. This Court does not sit to review such fact-intensive determinations. And in any event, the Third Circuit's determination is clearly correct. As we have set forth in detail in the Statement, *OSHA's notice of proposed rulemaking explicitly identified the scope of the Standard as an open issue to be resolved in the rulemaking, and explicitly invited comments on that issue. See supra* at 4. This was reiterated by OSHA's representative at the outset of the rulemaking hearing, *id.* at 5, and was not lost on other parties, who submitted evidence on this very issue, *id.*[14]

Nor is there any force to the contention that OSHA "violated the plain language of [its] governing statute" by not publishing a proposed rule under which the HCS would apply to non-manufacturing industries. ABC Pet. at 11. *See also* NGFA/UT Pet. at 23-25. Petitioners rely on § 6(b)(2) of the OSH Act, 29 U.S.C. § 655 (b)(2), which provides that to initiate rulemaking, "[t]he Secretary shall publish a proposed rule. . . ." OSHA, of course, *did* publish a proposed rule. To be sure, the rule as proposed did not cover non-manufacturing

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[14] ABC asserts that "OSHA repeatedly made clear its position that the Standard would not apply beyond the manufacturing sector." ABC Pet. at 13, citing 47 Fed. Reg. 12101-02. But the cited passage itself makes clear that what ABC describes as OSHA's "position" was simply the Agency's *proposal*, which OSHA explicitly stated was subject to modification depending on the evidence received. *See supra* at 4.

As for petitioners' contention that "the final non-manufacturing HCS contained significant provisions nowhere mentioned in the manufacturing HCS," ABC Pet. at 12; *see also* NGFA/UT Pet. at 25 n.18, the Third Circuit correctly determined that "[t]he slight changes that were made in the standard were a logical outgrowth of the rulemaking record. . . ." AGC Pet. App. at 9a.

employers. But nothing in § 6(b)(2) suggests that a final rule must be identical to the proposed rule—either with respect to its scope or with respect to any other provision—and such a requirement "would lead to the absurdity that in rule-making . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

Thus, as ABC appears to acknowledge, the most that can be drawn from § 6(b)(2) is that a proposed rule "should be sufficiently descriptive of the '*subjects and issues involved*' so that interested parties may offer informed criticisms and comments." ABC Pet. at 11, quoting *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 48 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (emphasis added). OSHA's 1982 notice easily satisfied that test.[15]

2. **"Foreclosure":** AGC complains that the Third Circuit held that petitioners were " 'foreclosed' by *USWA I* and *II*" from litigating two questions: first, "that [petitioners] had received adequate notice in 1982 that the standard might eventually regulate them, and [second] that OSHA properly found significant risk as to all industries based on the 1982 rulemaking record." AGC Pet. at 27.

In point of fact, as to both of these issues the Third Circuit, while stating that petitioners *should* be foreclosed from raising the matter, nevertheless proceeded to consider—and to reject on the merits—petitioners' contentions. *See* AGC Pet. App. at 11a ("The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry.

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[15] Thus, the decision below does not conflict with *Ethyl Corp.* or with the other cases cited in ABC's Petition at 13 and in NGFA/UT's Petition at 23-25.

Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected."); *id.* at 13a ("Assuming . . . that th[e] opinions [in *USWA I* and *USWA II*] were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different.") Thus, AGC was not "foreclosed" from having its contentions heard by the court below, and the question whether such "foreclosure" would have been proper is not presented.

AGC's argument is frivolous in any event. In *USWA I* and *II* AGC was in the situation that confronts any party potentially affected by a regulation when a provision of the regulation that the party supports is under review on the petition of a party which holds the opposite view. In any such case, the party that approves of the agency's decision has the choice either to intervene in support of the agency or to rely on the agency to defend its position in court. AGC argues for a third option, contending that a party that chooses to ignore such a review proceeding should retain a right to obtain "full judicial review of the standard later," AGC Pet. at 28. That contention is unsupported by any precedent, would result in a myriad of review proceedings involving the same issues, and —even worse—would leave the status of an OSHA standard in limbo until all such "later" proceedings were resolved.

3. **Significant Risk:** The Third Circuit held that in promulgating the HCS OSHA properly made a "significant risk finding [that] applied to all workers who would be exposed to hazardous chemicals." AGC Pet. App. at 12a-13a. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (the *Benzene case*) (OSH Act embodies a requirement that a standard must be directed at ameliorating a "significant risk"). AGC and NGFA/UT assail this determination, contending that a finding of significant risk requires "industry-specific showings." AGC Pet. at i, 16; NGFA/UT Pet.

at 27-28. ABC makes a similar contention, ABC Pet. at 15.[16]

There is nothing in the OSH Act or in the *Benzene* case to suggest that a finding of significant risk must be made on an industry-specific basis. Indeed, the concept of an "industry" plays no role in the scheme of the Act.[17] It is, moreover, simply not the case that every health or safety hazard varies so dramatically from one "industry" to another as to make it necessary to analyze each industry separately in order to determine whether a significant risk exists. Rather, as the Third Court correctly recognized, where OSHA properly concludes that the hazard involved (here, lack of information on the part of employees regarding the chemical hazards encountered on the job) is *common to all industries*, the logic of the

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[16] ABC couples its "significant risk" argument with additional contentions that we discuss *infra* at 19-20.

[17] The only reference to the term "industry" in the substantive provisions of the Act is in § 6(g), 29 U.S.C. § 655(g), which states that "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments." Nothing in the Act requires findings specific to each "industry," any more than the Act requires findings specific to each "trade," "craft," "occupation," "business," "workplace," or "work environment."

What is more, the term "industry" is not defined in the Act, nor has it been defined by petitioners, and the concept is an elusive one. For example, in the Standard Industrial Classification system, establishments are grouped into nine "divisions," which are in turn broken into more than eighty "major groups," designated by two-digit SIC Codes. See 52 Fed. Reg. 31868 (1987). Those two-digit classifications are further subdivided into three-digit and four-digit codes. The construction "industry" comprises Division C, consisting of three "major groups" and innumerable subdivisions. *Id.* AGC does not explain whether a requirement of "industry-specificity" would apply at the level of the nine "divisions," the more than eighty "major groups," or the hundreds of three- and four-digit SIC Code groupings.

situation and of the OSH Act is that the Agency may make a significant risk determination of corresponding breadth. No case has held to the contrary.[18]

Petitioners also assert that circumstances in the construction industry are such that employees in that industry, unlike their counterparts in other industries, face no significant risk when the employees are denied the information regarding chemical hazards that is required by the HCS. *See* AGC Pet. at 17-18; ABC Pet. at 15. That substantial evidence question does not warrant review and was, in any event, correctly resolved below.

OSHA found that as of 1977 the chemical source illness incidence rate in the construction industry, as reported by the Bureau of Labor Statistics ("BLS"), was 1.7 per 1,000 workers, *see* 48 Fed. Reg. 53285 (1983); and, as OSHA recognized, the incidence rates reported by BLS are seriously understated, *id.* at 53284. Of the eight major industrial sectors, only agriculture and manufacturing had higher chemical source illness incidence rates than construction. *Id.* at 53285. What is more, witnesses intimately familiar with conditions in the construction industry testified to the need for the Standard in this industry. *See* evidence cited *supra* note 7. Thus petitioners' contentions misstate the record.

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[18] In the case upon which petitioners principally rely, *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980) (*see* AGC Pet. at 16-17; NGFA/UT Pet. at 27-28; ABC Pet. at 15), medical studies affirmatively demonstrated that American *cotton gin workers* "do not suffer any long term impairment" from cotton dust exposure, 630 F.2d at 408. In those circumstances the Fifth Circuit held that studies showing the existence of such chronic impairment in *other* aspects of cotton manufacturing could not support a conclusion that a significant risk existed in *ginning*. *Id.* at 409. The holding in the case did not extend beyond that fact-bound determination; and the court certainly did not assert that OSHA must always assess significant risk industry-by-industry, or SIC Code-by-SIC Code.

4. **Feasibility:** Petitioners contend (1) that OSHA and the Third Circuit were required to "undertake [] an industry-by-industry analysis of feasibility," AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29; and (2) that the Court of Appeals improperly shifted the burden of proof on the question of the feasibility of the HCS to petitioners, *see* ABC Pet. at 16; AGC Pet. at 19-20, NGFA/UT Pet. at 29. The first contention misstates the law and the second contention misstates the Third Circuit's holding.

A. The feasibility requirement of the OSH Act requires only that the obligations imposed by a standard must be "capable of being done." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09 (1981) (*"ATMI"*). In determining whether this test has been met, the Act does not require OSHA to support its findings with an industry-by-industry analysis, but rather with "substantial evidence," however derived. OSH Act § 6(f), 29 U.S.C. § 655(f).[19] Furthermore, the very cases petitioners cite recognize that OSHA cannot be expected "to prove [a] standard *certainly* feasible for *all* firms at *all* times in *all* jobs," *United Steelworkers of America v. Marshall, supra*, 647 F.2d at 1270 (emphasis by the court), cited in ABC Pet. at 17, AGC Pet. at 20, and NGFA/UT Pet. at 29. Rather, OSHA need only establish a "presumption of feasibility," 647 F.2d at 1270, which "remains rebuttable," *id. See also ASARCO, Inc. v. OSHA*, 746 F.2d 483, 496, 498-99 (9th Cir. 1984).

Of course, in some cases the nature of a standard is such that the feasibility of compliance can be expected to vary dramatically from one context to another, and there is consequently a need to assess feasibility on a context-by-context basis. This is true, for example—and a presumption of feasibility must therefore be established separately as to each affected type of work—when a

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[19] See *supra* note 17 and text thereat.

standard requires the use of engineering controls and the controls that can be implemented in one industrial setting are entirely different from those that can be implemented in another. That was the situation in *Steelworkers v. Marshall* and in each of the cases cited by petitioners, *see* AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29. But petitioners overread those decisions just as they overread the "significant risk" cases discussed *supra* at 16 and n.18. The essence of the matter is that no decision holds that an industry-by-industry analysis is required in every case, without regard to the nature of the standard in question; and, as we have shown, nothing in the statute would support such a requirement.

In this case, the obligations imposed by the HCS on petitioners are very modest, and are of such a nature as to be well within the capabilities of any industry, *see supra* at 2-3. In these unique circumstances the Third Circuit was entirely justified in dismissing petitioners' claims of infeasibility with these words:

> When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. [*ABC v. Brock*, AGC Pet. App. at 14a.]

B. Nor did the Third Circuit improperly shift any evidentiary burden to petitioners with respect to the feasibility issue. Because, as discussed, there was ample basis for concluding that the modest obligations imposed by the HCS are feasible for all industries, the Third Circuit's holding that the Standard should apply to all industries except where OSHA "can state reasons why such application would not be feasible," *USWA I*, 763 F.2d at

739, AGC Pet. App. at 51a-52a, simply represents a proper application, in the factual context of this case, of the approach articulated in the very cases petitioners endorse. For those cases hold that OSHA need only make a finding of "*general* feasibility," *Steelworkers v. Marshall*, *supra*, 647 F.2d at 1272 (emphasis added); *ASARCO, Inc. v. OSHA*, *supra*, 746 F.2d at 498, while leaving open the possibility that the general finding may be rebutted by evidence of *infeasibility* in a particular setting. *See supra* at 17.

In any event, OSHA did not merely find an absence of evidence of *infeasibility*, but affirmatively found that compliance *is feasible* in all industries. *See* 52 Fed. Reg. 31855-57 (1987). Thus when all is said and done, petitioners' arguments reduce once again to a contention that OSHA and the Third Circuit gave less weight than petitioners would like to the allegedly unique circumstances of their industry. *See supra* at 16. OSHA however fully explained its rejection of petitioners' position, *see* 52 Fed. Reg. 31859 (1987), and this factual dispute presents no question worthy of this Court's review.

5. Reasonable Necessity: ABC and AGC raise a series of vaguely formulated—and, as we show, insubstantial—arguments based on § 3(8) of the Act, 29 U.S.C. § 652(8), which defines an "occupational safety and health standard" as a standard the requirements of which are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *See* ABC Pet. at 14-16; AGC Pet. at 21-23.

A. ABC relies on the portion of the *ATMI* case, 452 U.S. at 536-40, striking down an earnings-protection provision in the Cotton Dust Standard. *See* ABC Pet. at 14.[20] The infirmity the Court found in that provision was that:

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[20] The standard required employers to provide employees who were physically unable to wear a respirator the opportunity to

> OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." [452 U.S. at 538].

In other words, the Court held that OSHA may not promulgate a provision designed solely "to repair general unfairness to employees that is unrelated to achievement of health and safety goals." *Id.* at 540. The HCS contains no such provisions.[21]

B. The *ATMI* Court, while holding that § 3(8) cannot be construed to "countermand" the specific requirement of § 6(b)(5) that in promulgating standards for toxic materials OSHA must promulgate the most protective standard feasible, 452 U.S. at 513,[22] suggested that § 3(8) "might come into play as an additional restriction" if OSHA were to impose requirements in a standard that were entirely *redundant*, such that "the *same reduction* in health risk" would be achieved in the

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transfer to another position. The challenged portion of that provision required "the employer [to] guarantee that the employee [who transfers] suffers no loss of earnings or other employment rights or benefits." 452 U.S. at 537.

[21] As long as a provision promulgated by OSHA has a health-protective purpose and is consistent with the Agency's mandate to promulgate the most protective standard that is feasible, the provision need only satisfy the familiar test that regulatory action must be "reasonably related to the purposes of the enabling legislation." *Forging Industry Assn. v. Secretary of Labor*, 773 F.2d 1436, 1447 (4th Cir. 1985) (*en banc*), quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). *Accord, Steelworkers v. Marshall, supra*, 647 F.2d at 1237. There is no contention here that the HCS fails that test.

[22] *See also National Grain and Feed Ass'n v. OSHA*, slip op. at 5-7 (5th Cir. Jan. 24, 1989), *modifying opinion published at* 858 F.2d 1019 (1988); *Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988); *ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984).

absence of the superfluous requirements. 452 U.S. at 514 n.32 (emphasis added).[23] *Cf. ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984). AGC asserts that OSHA transgressed that *possible* limitation here and that this case is an "ideal vehicle" for settling the scope of § (8). AGC Pet. at 21. This case does not, however, raise any question as to § 3(8)'s scope.

All parties to these cases have proceeded on the assumption that if "the *same reduction* in health risk" (*ATMI, supra*) would occur in the absence of the Standard, the Standard would be invalid. Petitioners' contention that the HCS is subject to attack on this ground failed not because of any disagreement on the governing legal rule but because the contention is unsupportable on the facts.[24]

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[23] In the same footnote the Court left open the question "[whether] \§ 3(8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6(b)(5) of the Act." *Id.* at 513 n.32. Since the HCS was promulgated under § 6(b)(5) no such § 3(8) question is presented here. A related question is whether such balancing might be required or permitted in the case of standards dealing with *safety*, as distinguished from *health*; that is the issue with which "the Fifth Circuit has recently struggled," AGC Pet. at 22-23. *See National Grain and Feed Ass'n v. OSHA, supra.* Since the HCS is a *health* standard, *see* 48 Fed. Reg. 53320 (1983); *USWA I*, AGC Pet. App. at 40a-42a, the question presented in that case is not presented here.

[24] Thus, ABC contends that there is no need for the HCS in construction because construction contractors are already subject to a training requirement. ABC Pet. at 15, citing 29 C.F.R. § 1926.21. This argument is patently lacking in merit. OSHA properly determined that effective hazard communication requires three components, and that "[n]o one of these three components alone—labels, material safety data sheets, or training—can be demonstrated to be completely effective in communicating hazards." 48 Fed. Reg. 53311 (1983). *See also* 52 Fed. Reg. 31858-59 (1987) (discussing the need for MSDSs in the construction industry in order to make training programs effective). The Third Circuit was therefore correct in concluding that the provisions of the HCS which "require[] . . . maintenance on the jobsite of information on

6. Setting Rulemaking Priorities: AGC asserts that in *USWA I* and *USWA II* the Third Circuit intruded on the administrative province by interfering with OSHA's setting of rulemaking priorities. AGC Pet. at 24-26.

As a threshold matter AGC did not advance this contention below, and therefore cannot do so now.[25] It can moreover easily be shown that AGC's contention is unfounded and, out of caution, we make that showing now.

Unlike cases where parties seek to compel OSHA to undertake a rulemaking the Agency does not wish to undertake, or to expedite a rulemaking the Agency does not wish to expedite (see cases cited in AGC Pet. at 26), *USWA I* involved a challenge to OSHA's resolution of an issue that was squarely presented and resolved in a *completed* rulemaking that OSHA undertook of its own accord. In *USWA I* no party was seeking to dictate how OSHA's rulemaking resources should be allocated; the

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[chemical] risks can only make the existing training more effective." *AGC v. Brock*, AGC Pet. App. at 13a.

AGC complains about the requirement that MSDSs must be "physically present on every construction jobsite," AGC Pet. at 22; but as OSHA determined, this is needed so that "[e]mployees will . . . be able to access the information as required." 52 Fed. Reg. 31865 (1987) (discussing written hazard communication programs). *See also id.* at 31866 (discussing MSDSs).

And, AGC's contention that the HCS requires employers to provide "redundant hazard training to experienced construction tradesmen each time they move from job to job," AGC Pet. at 22, grossly exaggerates the actual requirements of the HCS in this regard—requirements that are "performance-oriented" and flexible. 52 Fed. Reg. 31866 (1987), 48 Fed. Reg. 53311-12 (1983).

[25] AGC's briefs to the Third Circuit did not even cite the provision of the OSH Act, § 6(g), 29 U.S.C. § 655(g), upon which AGC now seeks to base its argument. What is more, the case in which AGC has sought certiorari, *ABC v. Brock*, is, by AGC's own account, "not 'the same case' " as *USWA I* and *II*. *See* AGC's Reply Brief in *ABC v. Brock* at 7. Accordingly, AGC cannot, by petitioning for certiorari in *ABC v. Brock*, bring before this Court the rulings in *USWA I* and *II*.

only question presented was whether a standard actually issued by the Agency satisfied the requirements of § 6(b)(5). *See supra* at 7-8. As the Third Circuit recognized, OSHA's authority to set rulemaking priorities, embodied in § 6(g) of the Act, 29 U.S.C. § 655(g), does not shield the Agency from being called to account when a standard promulgated by the Agency for toxic substances provides less protection than § 6(b)(5) mandates, whether the failure is in not providing proper protection to covered employees or in not properly covering employees. *USWA I*, AGC Pet. App. at 40a, *citing United Steelworkers of America v. Marshall*, *supra*, 647 F.2d at 1309-10. *See also Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1270-72 (D.C. Cir. 1988); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). The decisions are uniform on this point.[26]

The decision in *USWA II*, which required OSHA to complete the reconsideration required by *USWA I* without the unnecessary delay that would be occasioned by another round of notice-and-comment, represented, in turn, a straightforward application of the Third Circuit's express statutory authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), bolstered by that court's authority to enforce its judgment in *USWA I* by issuing "all writs necessary or appropriate in aid of" its jurisdiction, 28 U.S.C.

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[26] The Third Circuit's reliance on the D.C. Circuit's decision in *Steelworkers v. Marshall* is answer enough to AGC's contention that the Third Circuit's resolution of this issue "squarely conflict[s] with several rulings of the D.C. Circuit, which has articulated a much more exacting standard for judicial intervention into OSHA's priority-setting." AGC Pet. at 26.

In *Steelworkers v. Marshall* the D.C. Circuit made it clear that a decision to exclude an industry from a standard, made after a rulemaking in which that point was at issue, is subject to full judicial review and must be shown to comport with the record evidence and the statutory mandate. *See* 647 F.2d at 1309-10.

§ 165(a). *See USWA II*, AGC Pet. App. at 68a. AGC's assertion that the court below was simply seeking to impose on OSHA its "own notion of which procedures are 'best,'" AGC Pet. at 24, quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is empty rhetoric that has no basis in the Third Circuit's order.

7. Delegation to a Private Party: NGFA contends that OSHA "delegat[ed] . . . its rulemaking authority to a private entity," NGFA/UT Pet. at i, 9, by adopting the Threshold Limit Values list of the American Conference of Governmental Industrial Hygienists (ACGIH), as one of the base lists of hazardous substances covered by the HCS; and NGFA argues that this "delegation" violated both the OSH Act, NFGA/UT Pet. at 10-19, and the Constitution, *id.* at 19-22. This contention is not worthy of further review on two independent grounds.

A. The "delegation" issue is of no present practical moment by reason of a recent rulemaking action by OSHA. NGFA has attacked OSHA's alleged delegation of authority only with regard to the inclusion of *grain dust* as a hazardous substance.[27] As a result of a new standard for Air Contaminants published by OSHA on January 19, 1989 (amending 29 C.F.R. Part 1910, Subpart Z), *grain dust is now covered by the HCS under the provision that covers all substances included in the Air Contaminants Standard* as well as under the provision providing coverage by reason of the ACGIH listing. *See* 29 C.F.R. § 1910.1200(d)(3), discussed *supra* at 2-3. OSHA took the step of adding grain dust to the Air Contaminants Standard after reviewing the "substantial amount of information . . . submitted to the record [of

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[27] This was the extent of NGFA's challenge case in the court below as well as in this Court. Indeed, NGFA would lack standing to challenge the HCS as the Standard applies to anything other than grain dust.

the Air Contaminants rulemaking] addressing the health evidence [with respect to grain dust]," and determining "that an exposure limit for grain dust is necessary to reduce the significant risk of adverse respiratory effects associated with exposure to this material." 54 Fed. Reg. 2510 (Jan. 19, 1989).

Against this background, a ruling in NGFA's favor on its "delegation" claim would have no effect on NGFA's hazard communication obligations.[28] Thus the "delegation" question is only of academic interest in this case.

B. Turning to the merits, NGFA seeks to extend the delegation concept to new lengths by arguing that OSHA "delegated its rulemaking authority" to a private entity by adopting that entity's scientific determination that certain substances are hazardous. The Government relies on the determinations of private scientists from Newton on down every day. And NFGA does not cite a single case in which this Court or any other has struck down, on statutory or constitutional grounds, *any* regulation as an unlawful delegation of authority to a private entity, much less a regulation involving the kind of normal and benign reliance on private scientific learning involved here.[29]

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[28] Even without the recent amendment to Subpart Z, it is far from clear that NGFA would have standing to attack the use of the ACGIH list. As NGFA has acknowledged, grain dust is covered under the HCS as a *physical* hazard, due to its combustibility. *See* Exh. 2-97, OSHA Docket H-0221 (NGFA requests exemption for grain dust on the ground that its combustibility is "unmistakable"). *See also ABC v. Brock*, AGC Pet. at 13a ("As to the risks posed by grain dust, the propensity of grain elevators to blow up has been well documented"). Grain dust would therefore be covered by the HCS as a *physical* hazard even if the dust were not listed as a *health* hazard by ACGIH or OSHA. *See* 29 C.F.R. § 1910.1200(c), 52 Fed. Reg. 31879 (1987) (defining "hazardous chemical" as "any chemical which is a physical hazard or a health hazard").

[29] Insofar as the statutory question NGFA seeks to raise is concerned, the most that can be said of § 6(a), 29 U.S.C. § 655(a),

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

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and of its legislative history, discussed at length in NGFA Pet. at 14-17, is that OSHA is not *compelled*, and perhaps not permitted, to adopt ACGIH *standards* without engaging in *§ 6(b) rulemaking*. Here, as noted, OSHA did not adopt any ACGIH *standard*. Rather, *after a § 6(b) rulemaking*, OSHA simply determined that certain scientific determinations by ACGIH should be adopted as one of the mechanisms for triggering the applicability of substantive regulatory requirements *crafted by OSHA*.